89-778

Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

William W. Hollander,
Petitioner,

v.

The United States District Court
for the Eastern District of Missouri,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1915(d) authorizes a federal court to compel an unwilling attorney to represent an indigent civil litigant?

2. Whether an Article III inferior federal court possesses any inherent powers, not bestowed upon it by congressional legislation, which authorize it to compel an unwilling attorney to represent an indigent civil litigant?

3. The United States District Court for the Eastern District of Missouri has ordered Petitioner to represent an indigent civil litigant pursuant to the courts inherent powers. The court has made no provision to pay Petitioner for his services, nor for his expenses. Does this action constitute a taking of Petitioner's private property for a public purpose without just compensation in violation of the Fifth Amendment of the United States Constitution?

PARTIES

Petitioner, William W. Hollander is an attorney licensed to practice law in the State of Missouri and was admitted to the federal bar on November 24, 1988.

Respondent is the United States District Court for the Eastern District of Missouri.

Eldon Mellott is an inmate in the Farmington Correctional Center, a penal institution of the Department of Corrections of the State of Missouri. Mr. Mellott is the indigent civil litigant whom the Respondent ordered Petitioner to represent.

Dr. King and various other "John Does" are the Defendants below. They are employees of the Department of Corrections, who were sued by Eldon Mellott for allegedly violating Mellott's Eighth Amendment right to be free from cruel and unusual punishment.

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TO: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A.

The orders of the District Court dated December 1, 1988 and August 15, 1989 are reproduced in Appendices B and C.

JURISDICTION

The decision of the Court of Appeals was entered on September 12, 1989. This petition is timely filed within sixty days of said date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1651 (a).

FEDERAL STATUTES INVOLVED

The only relevant federal statute is 28 U.S.C. § 1915 (d). The statute is reproduced in Appendix D.

STATEMENT

On or about November 24, 1988 Petitioner was admitted to practice law in the United States District Court for the Eastern District of Missouri.

On December 1, 1988 Petitioner received an order from the U.S. District Court for the Eastern District of Missouri, which stated *inter alia* that "William W. Hollander be and is hereby appointed counsel for Plaintiff Eldon Mellott pursuant to 28 U.S.C. Section 1915 (d)".

On December 13, 1988 in the belief that Petitioner had no option to refuse to comply with said "order" Petitioner filed an entry of appearance on behalf of Plaintiff Eldon Mellott in cause # N-88-0136-C.

Subsequent to said date Petitioner, although entirely unfamiliar with Federal Court practice or civil rights litigation met with Eldon Mellott in Farmington, Missouri, conducted an initial investigation into the facts surrounding the case and commenced to attempt to prepare the case for trial.

Petitioner expended substantial time and his own funds in attempting to represent said plaintiff and in traveling to Farmington, Missouri to meet with plaintiff.

On May 16, 1989 Petitioner filed his Motion To Withdraw As Counsel For Plaintiff Eldon Mellott, on the basis that Respondent exceeded its jurisdiction in entering the order of December 1, 1988.

On August 17, 1989 Petitioner received by regular mail an order from Respondent, signed by the Honorable George Gunn, stating *inter alia* that "It is hereby ordered that William W. Hollander's motion to withdraw as attorney for plaintiff herein be and it is denied. The court shall require Mr. Hollander to represent plaintiff, an indigent who is unable to retain counsel, pursuant to this court's inherent powers."

On September 1, 1989 Petitioner filed his Petition for Writ of Certiorari in the Eighth Circuit Court of Appeals seeking relief from Respondent's orders of December 1, 1988 and August 15, 1989 on the grounds that Respondent exceeded its jurisdiction, that Respondent possesses no "inherent powers" and that Respondent's orders violate the Fifth Amendment of the United States Constitution by taking private property for a public use without just compensation.

On September 12, 1989 the United States Court of Appeals entered a brief opinion denying Petitioner the relief which he sought.

Petitioner now brings this Petition And Application For A Writ of Certiorari against Respondent, the United States District Court for the Eastern District of Missouri.

REASONS FOR GRANTING WRIT

1. **Respondent Exceeded Its Jurisdiction By Entering Its Order Of December 1, 1988 Because 28 U.S.C. Section 1915 (d) Does Not Authorize A Federal Court To Require An Unwilling Attorney To Represent An Indigent Litigant In A Civil Case.**

Respondent seeks by its order of December 1, 1988 to compel Petitioner to represent an indigent civil litigant against Petitioner's will. In said order Respondent states, "It is further ordered that William W. Hollander . . . be and is appointed pursuant to 28 U.S.C. Section 1915 (d) to represent Plaintiff in this action."

The terms and language of said order and Respondent's refusal to excuse Petitioner from the case clearly indicate that Respondent seeks to assert some authority to compel Petitioner to represent Mellott. Informally and by filing his motion to withdraw, Petitioner has obviously stated that he will not at this time voluntarily provide said service at Respondent's request. At issue is whether 28 U.S.C. Section 1915 (d) authorizes Respondent to compel Petitioner to represent Mellott, against Petitioner's will.

On May 1, 1989 the United States Supreme Court entered its opinion in the case of *John E., Mallard v. United States District Court for the Southern District of Iowa, et al,* Slip Opinion Number 87-1490 (May 1, 1989).

Mallard, like Petitioner Hollander, was an attorney recently admitted to practice in the District Court. Mallard was selected just as Petitioner was from a list of newly admitted attorneys and ordered to represent indigent civil litigants who had brought a complaint pursuant to 42 U.S.C. Section 1983. Mallard reviewed the court file and subsequently filed a motion to withdraw. The Magistrate denied Mallard's motion and he appealed to the District Court. The District Court also denied Mallard's motion and in December of 1987 Mallard sought a Writ of Mandamus from the Eighth Circuit Court of Appeals to compel the District Court to allow his withdrawal. The Court of Appeals just as in this case, upheld the District Court and Mallard sought a Writ of Certiorari from the United States Supreme Court. This Court granted Certiorari and on February 28, 1989 heard oral argument in the case. On May 1, 1989 this court held:

> ". . . the District Court plainly acted beyond its jurisdiction as our decisions have interpreted that term for, as we decide today, Section 1915 (d) does not authorize coercive appointments of counsel." (*Mallard*, Slip Opinion at 13).

Petitioner, just as Mallard, is by Respondent's orders of December 1, 1988 and August 15, 1989 being coerced to provide Mellott with representation against his will. Respondent's initial order of December 1, 1988 clearly seeks to exercise some authority derived from 28 U.S.C. Section 1915 (d). No other statute or source of authority is contained in said order and the language of it in no way demonstrates that it was a "request" or that Petitioner had any option in accepting or rejecting the task set forth.

Furthermore Petitioner was informed by Respondent that Petitioner's schedule, ethical beliefs or personal and professional obligations would not excuse Petitioner from representing Mellott. Nothing about the context of the order or the facts surrounding its entry even remotely suggests that compliance was optional. The order of December 1, 1988 is obviously compulsory and coercive in its language as well as its application by Respondent.

In the *Mallard* opinion, *supra* this Honorable Court examined in detail this precise issue of whether Section 1915 (d) authorizes any coercive action by the District Court. After a scrupulous analysis of 28 U.S.C. 1915 (d) and the history surrounding its enactment this Court stated:

> "Perhaps the clearest proof that Congress did not intend Section 1915 (d) to license compulsory appointments of counsel is the contrast between that subsection and Section 1915 (c). Whereas Section 1915 (d) merely empowers a court to request an attorney to represent a litigant proceeding in forma pauperis, Section 1915 (c)-

> adopted at the very same time as Section 1915 (d)- treats court officers and witnesses differently: "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." Congress evidently knew how to require service when it deemed compulsory service appropriate. Its decision to allow federal courts to request attorneys to represent impoverished litigants, rather than command, as in the case of court officers, that lawyers shall or must take on cases assigned to them, bespeaks an intent not to authorize mandatory appointments of counsel." (Mallard, Slip Opinion at 5.)

You further held that:

> "To the extent that "Assignment" or "appointment of" counsel denotes the imposition of a duty to undertake representation that courts may enforce, Congress decision to allow federal courts to do no more than "request" an attorney to serve, in full awareness of more stringent state practices, seems to evince a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional or ethical concerns bid them to do so." (*Mallard*, Slip Opinion at 7).

In light of this clear statement by this Court it is obvious that you intended the holding to allow the members of the federal bar to exercise some independent judgement and a free choice in either accepting or rejecting the request of a Federal District Court to represent an indigent civil litigant. Petitioner submits that he has such personal, professional, and ethical concerns which prevent him from accepting this case voluntarily.

> ". . . the District Court plainly acted beyond its jurisdiction as our decisions have interpreted that term for, as we decide today, Section 1915 (d) does not authorize coercive appointments of counsel." (*Mallard*, Slip Opinion at 13).

Petitioner, just as Mallard, is by Respondent's orders of December 1, 1988 and August 15, 1989 being coerced to provide Mellott with representation against his will. Respondent's initial order of December 1, 1988 clearly seeks to exercise some authority derived from 28 U.S.C. Section 1915 (d). No other statute or source of authority is contained in said order and the language of it in no way demonstrates that it was a "request" or that Petitioner had any option in accepting or rejecting the task set forth.

Furthermore Petitioner was informed by Respondent that Petitioner's schedule, ethical beliefs or personal and professional obligations would not excuse Petitioner from representing Mellott. Nothing about the context of the order or the facts surrounding its entry even remotely suggests that compliance was optional. The order of December 1, 1988 is obviously compulsory and coercive in its language as well as its application by Respondent.

In the *Mallard* opinion, *supra* this Honorable Court examined in detail this precise issue of whether Section 1915 (d) authorizes any coercive action by the District Court. After a scrupulous analysis of 28 U.S.C. 1915 (d) and the history surrounding its enactment this Court stated:

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In light of this clear statement by this Court it is obvious that you intended the holding to allow the members of the federal bar to exercise some independent judgement and a free choice in either accepting or rejecting the request of a Federal District Court to represent an indigent civil litigant. Petitioner submits that he has such personal, professional, and ethical concerns which prevent him from accepting this case voluntarily.

Respondent's order of December 1, 1988 on its face and in its practical effect is coercive and compulsive in nature. The facts and circumstances surrounding the "appointment" of Petitioner are identical to the facts of Mallard's appointment. The holding of this nation's highest court in *Mallard* supra is unequivocal and forthright in its implications. 28 U.S.C. Section 1915 (d) does not authorize a District Court to make coercive appointments of counsel for indigent civil litigants.

Respondent's order of December 1, 1989 seeks to accomplish that which Respondent does not possess the power to do, and Petitioner's Motion to Withdraw should therefore have been sustained. To uphold Respondent's wrongful assertion of such authority would be to consciously ignore the principal of Stare Decisis and the law as set forth by our country's Supreme tribunal. For all of the above reasons Respondent's orders of December 1, 1988 and August 15, 1989 should be overturned.

In light of the above Petitioner William W. Hollander respectfully submits that Respondent does not possess the authority to force Petitioner to represent Eldon Mellott and Respondent exceeded its jurisdiction in entering its orders of December 1, 1988 and August 15, 1989. Petitioner's Motion to Withdraw was improperly denied.

2. Respondent Does Not Possess Any Inherent Authority Which Allows It To Coerce Petitioner To Represent An Indigent Civil Litigant, Because Under Article III, Section 2 Of The United States Constitution The Inferior Federal Courts Possess Only Such Powers As Congress Has Bestowed Upon Them By Statute.

On December 1, 1988 Respondent initially ordered Petitioner to represent Eldon Mellott pursuant to 28 U.S.C. Section 1915 (d). On May 16, 1989 Petitioner filed his Motion To Withdraw as

counsel for Mellott on the grounds that 28 U.S.C. Section 1915 (d) did not authorize such coercive appointments of counsel. On August 15, 1989 Respondent entered its order denying Petitioner leave to withdraw. Said order stated:

> "It is hereby ordered that William W. Hollander's, Motion To Withdraw As Attorney For Plaintiff herein be and it is denied. The court shall require Mr. Hollander to represent plaintiff, an indigent who is unable to retain counsel pursuant to this courts inherent powers."

The order seeks, after the fact, to exercise the "inherent power" of the court to compel Petitioner to represent Mellott. This order in no way purports to request or suggest that Petitioner represent Mellott. The plain meaning of the order is that it is mandatory. If one does as this Court did in *Mallard* supra and looks to the plain meaning of the word "require" (Slip Opinion at 4) it is apparent that the term is synonymous with coerce. Petitioner is by Respondent's order compelled to represent Mellott against his will.

The issue at hand is one which is easily framed. Does Respondent possess the inherent power as a Federal District Court to coerce an unwilling attorney to represent an indigent civil litigant bringing suit under 42 U.S.C. Section 1983? The facts and issues presented in the case at bar parallel those in *Mallard v. United States District Court of Southern Iowa, et al*, supra with a single exception. In *Mallard*, "the District Court did not invoke its inherent power and in its opinion below the Court of Appeals did not offer this ground for denying Mallard's application for a Writ of Mandamus." (Slip Opinion at 13). As stated above, in the instant case, Respondent's order of August 15, 1989 invokes this "inherent power" and the Eighth Circuit has relied upon it in their opinion of September 12, 1989 denying Petitioner the relief which he seeks.

Any examination of the power possessed by the federal courts must properly begin with the source from which their power is derived, specifically the United States Constitution.

Respondent attributes its power to its status as a United States District Court. Being such it is properly termed an inferior federal court. (Article III Section 2, United States Constitution.)

A review of the language of Article III and the authoritative cases interpreting it quite readily reveals that inferior federal courts derive their power solely from Congress. In the case of *Malamud v. Sinclair Oil Corporation*, 521 F. 2nd 1142, at 1146 (6th Cir. 1975) the court held:

> "Article III, Section 2 of the Constitution establishes the boundaries for the limited jurisdiction of the federal courts. However within these constitutional strictures Congress has considerable discretion in dealing with the jurisdiction of the lower federal courts. Although the judicial power of the government is provided for in the constitution it remains for congress to allocate this power to grant or to withhold from the federal courts jurisdiction in specific types of cases."

This basic tenant of constitutional law was originally set forth over 100 years ago in the famous law school text- book case of *Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 19 L.Ed 264 (1869).

McCardle was a southern sympathizer in the post war South and was imprisoned under the terms of an act of Congress. When McCardle petitioned for Habeas Corpus relief Congress legislatively withdrew from the federal courts their power of review. The statute was upheld on the grounds that the federal courts possess only such power as Congress bestows and here congress had clearly withdrawn any statutory jurisdiction.

In *McCardle* this court undertook a scrupulous analysis of the

relationship between congressional legislation and the powers of the federal courts. In holding explicitly that the courts possess only such powers as Congress bestows upon them, this court stated:

> "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What then is the affect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." (*McCardle*, supra)

This court determined in *Mallard* supra, the clear intent of Congress with regard to coercive appointments of counsel to represent civil litigants specifically, that Congress knew how to empower the courts to make coercive appointments, and in the case of indigent civil litigants chose not to do so. To hold that Respondent now possesses such coercive powers in light of Congress' clear decision to the contrary would upset over 200 years of case law as to the balance of power between the legislative and judicial branches of our government. *McCardle*, and Article III dictate that this court must find in favor of Petitioner.

The definition of the source of the powers of federal courts was more strongly set forth in the case of *Hargrave v. McKinney*, 413 F. 2nd 320, at 326 (5th Cir. 1969).

> "Jurisdiction is a matter of naked power which can be regulated only by Congress consistent with Article III of the Constitution ."

More recently the court held in *United Gas Pipe Line Company v. Whitman*, 595 F. 2nd 323, at 330 (5th Cir. 1979):

> " It is axiomatic that federal courts are of limited jurisdiction and that only Congress may retract or expand the limits of federal judicial power." (citing *Ex Parte McCardle*)

It has been clearly determined, as revealed above and in cases cited therein that the lower federal courts possess only such powers as Congress bestows on them. Indeed as in *McCardle*, supra, Congress can remove powers already vested in the Article III Judiciary by statute.

In Petitioner's case he was appointed to represent Mellott pursuant to 28 U.S.C. Section 1915 (d). After the entry of the *Mallard* opinion Petitioner moved to withdraw as counsel for Mellott. Petitioner was under *Mallard*, clearly entitled to the relief which he sought. No inquiry was made as to the basis of Petitioner's motion. As stated above herein Petitioner was "required" to represent Mellott pursuant to the courts "inherent powers". Respondent rests said order on no statute or constitutional provision. Rather Respondent suggests this power is "inherent" within the Article III federal court simply because of its existence.

It then would appear that the power of the District Court to coerce Petitioner to represent Mellott pursuant to Section 1915 (d) was clearly decided by *Mallard*. This appears especially true if one looks to the language of the Districts Court's order of August 15, 1989 and sees no reference to Section 1915 (d). The question thus before this court is most precisely, does the District Court possess some power beyond such powers as Congress bestows on

it. Does Respondent possess the inherent powers invoked in the order of August 15, 1989?

The issue of inherent power was addressed in *Gamble v. Central Georgia Railway Company*, 486 F. 2nd 781, at 785 (5th Cir. 1977).

> "It is mandated by the Constitution, Article III Section 2 that Congress has the sole power to fix the Jurisdiction of the federal courts and it follows that when congress has deprived the federal courts of jurisdiction in certain cases, the courts cannot ad hoc reinvest themselves with that jurisdiction either in individual cases or otherwise." (Citing *Ex Parte McCardle*)

Petitioner respectfully submits to this court that Respondent's order of August 15, 1989 is just such an ad hoc self reinvestment of judicial jurisdiction by a lower federal court, contrary to any power bestowed by statute. Said order is unconstitutional under Article III, Section 2 of the U.S. Constitution in that it seeks to assert an inherent power which is nonexistent and without basis in law or statute.

To uncover the statutory intent of Congress with regard to compulsory appointments of counsel to represent civil litigants, is to go full circle and look once again at the opinion in *Mallard v. U.S. District court of Southern Iowa et al*, Slip Opinion #87-1490 (May 1, 1989).

This court in ruling on the meaning of 28 U.S.C. Section 1915 (d) examined in detail the statutory history, legislative intent and circumstances surrounding its enactment. The opinion itself is a relatively detailed history of Congress acts and determinations with regard to the compulsory appointment of counsel to represent civil litigants. This review reveals no alternative statutory source for the power that the Magistrate sought to invoke in *Mallard*. In

examining the history of legislation with regard to compulsory representation of civil litigants, this court stated in *Mallard*, supra.

> "Perhaps the clearest proof that Congress did not intend Section 1915 (d) to license compulsory appointments of counsel is the contrast between that subsection and Section 1915 (c). Whereas Section 1915 (d) merely empowers a court to request an attorney to represent a litigant proceeding in forma pauperis, Section 1915 (c)- adopted at the very same time as Section 1915 (d)- treats court officers and witnesses differently: "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." Congress evidently knew how to require service when it deemed compulsory service appropriate. Its decision to allow federal courts to request attorneys to represent impoverished litigants, rather than command, as in the case of court officers, that lawyers shall or must take on cases assigned to them, bespeaks an intent not to authorize mandatory appointments of counsel." (*Mallard*, Slip Opinion at 5)

This Court further discussed the issue of whether Respondent possesses any inherent powers as a District Court in the last Paragraph of footnote #4:

> "The dissent's further argument that Mallard's admission to practice implicitly included on obligation to participate in the District Courts program for providing representation to indigent civil litigants, because the program was established before he joined the bar is equally unavailing. *The District Courts program derived its putative authority from Section 1915 (d) alone*." (emphasis added)

Petitioner respectfully submits to this honorable court that Respondent had no jurisdiction to enter the order of December 1, 1988, that Petitioner's Motion to Withdraw should have been promptly sustained in light of *Mallard* supra, that Respondent's order of August 15, 1989 attempts to invoke some inherent power, when Article III Section 2 of the U.S. Constitution, *Mallard*, *Ex Parte McCardle* and the cases cited within clearly demonstrate that Congress bestowed no such power on Respondent and therefore this Writ should issue.

The facts of Mallard's case are identical to the case at bar and because of this, like Mallard, Petitioner has no alternative remedy available to him. As the Mallard court explained:

> " . . . the principle reasons for our reluctance to condone the use of the Writ - the undesirability of making a district court judge a litigant and the ineffectiveness of piecemeal appellate litigation (citing cases) are not present here. The District Court Judge was never made a party to this action nor did Mallard's petition attempt to sever one element of the merits litigation from the rest. Thus Mallard discharged his burden of proving that he was entitled to a Writ of Mandamus and the Court of Appeals erred when it denied his application." (Mallard, Slip Opinion at 13.)

Respondent possesses no inherent powers to coerce Petitioner to represent Mellott and therefore for all of the foregoing reasons Respondent's orders of December 1, 1988 and August 15, 1989 should be reversed and this Writ should properly be issued.

3. Respondent's Orders Of December 1, 1988 And August 15, 1989 Effectively Seek To Take Petitioner's Private Property For A Public Purpose Without Just Compensation.

As previously explained herein above Respondent seeks, by it's orders, to compel Petitioner to represent an indigent civil litigant. Respondent submits to this court and it is evident from the record below that no provision was made to repay Petitioner for his services nor to cover Petitioner's expenses.

It should be clear from the language of Respondent's orders and the complete lack of any evidence concerning payment of fees or expenses that Respondent clearly was not concerned with reimbursing Petitioner for those sums.

Plaintiff Eldon Mellott is by the court's own determination an indigent unable to afford to retain counsel and to suggest that Respondent thought Mellott would cover any expenses of litigation is preposterous. The effect, if not the intent, of Respondent is that such expenses as travel, postage and long distance phone charges will be borne by Petitioner. Indeed upon inquiring of Respondent as to the payment of expenses, Petitioner was advised that he was responsible for such costs and like the non compensated representation, such expenses were a "cost of doing business." 28 U.S.C. Section 1915 (d) makes no provision for payment of said expenses and Respondent has never offered to reimburse Petitioner for such expenses.

Petitioner submits that even the most cursory investigation of Respondent's policies in the past would reveal that while Respondent may on occasion cover the costs of substantial expenses such as depositions, no repayment is made to appointed attorneys for day to day out of pocket expenses.

The court acknowledged in *Nelson v. Redfield Lithograph Printing*, 728 F. 2nd 1003, at 1005 (8th cir. 1984),

> "...that under Section 1915 (d) there is no provision for the payment of attorneys fees however upon proper showing the court *may* reimburse appointed counsel for expenses made in good faith from funds contributed by

> attorneys admitted to the court. If a similar fund is not available in the district court until such fund is established the court of appeals has such a fund..." (emphasis added)

The above holding acknowledges that no such funds have been offered to appointed counsel. Furthermore the court uses the term "may" reimburse. This is prima facia evidence that no provision requires Respondent to repay Petitioner for expenses advanced on behalf of the client, by appointed counsel. Furthermore, the very statement "reimburse" presupposes that appointed counsel will advance such sums.

Additionally it is clear that Respondent took no measures to make such funds available to Petitioner at any time. From the day that Petitioner affixed a postage stamp to the first piece of correspondence mailed in connection with this appointment, Petitioner had been required to expend his own funds on behalf of Mellott and Respondent. The issue is whether such an arrangement constitutes a "taking" in violation of the Fifth Amendment to the United States Constitution.

The Fifth Amendment guarantees that there will be no taking of private property for a public use without just compensation. The Supreme Court has recognized that the fact that the property is of negligible or little value does not remove it from the provisions of the Fifth Amendment. *Loretto v. Teleprompter of Manhattan CATV Corporation, et al*, 102 S. Ct. 3164, 458 U.S. 419 (1982). Therefore the exact sum which Petitioner has expended on behalf of Mellott and Respondent is not an issue. Furthermore the guarantee of the Fifth Amendment is by its terms unequivocal, that there will be *no* such takings. While under *Nelson, supra* Respondent "may" reimburse Petitioner, the holding does not require Respondent to do so. Said fact renders this arrangement unconstitutional under the provisions of the Fifth Amendment.

All evidence suggests that Petitioner is expected to expend such sums as costs of medical records, postage, copies, stationary, secretarial services, travel expenses, phone charges, envelopes, pencils and other miscellaneous expenses in the hope that Petitioner will be able to convince Respondent they were made in "good faith" under *Nelson, supra.* No provision guarantees that Petitioner will be reimbursed and the possibility of advancing such monies to Petitioner prior to expenditure has never even been suggested.

Petitioner submits to this court that Respondent's coercion of Petitioner to represent Mellott with no provision for compensation nor expenses is a Fifth Amendment taking, as it constitutes a taking of Petitioner's private property (his services and funds) for a public purpose (Respondent's evident desire to provide Mellott with counsel at no cost to Mellott) without just compensation. Our country's courts have recognized an attorney's time is the only thing he has to market and it is therefore private property. *State ex rel, Stephen v. Smith*, 242 Kans. 336, 747 P 2nd 816,at 835 (1987) and *Webb v. Baird*, 6 Ind. 13, at 17 (1854). Furthermore it should be clear that any sums Petitioner spends on this coerced representation of Mellott are clearly Petitioner's private property.

While some authorities have argued that an attorney is on notice that he must provide pro bono representation and therefore there is no taking, this argument is without support. Assuming *arguendo* that this proposition were true it offers no justification for attorneys compelled to represent indigent civil litigants after the entry of the *Mallard* opinion. Said opinion clearly holds that Section 1915 (d) does not authorize compulsory appointments in civil cases. *Mallard v. United States District Court of Southern Iowa et al, supra.* Any reasonable lawyer would conclude such representation could no longer be compelled.

Subsequent to arriving at said conclusion though Petitioner now finds himself compelled pursuant to the court's "inherent powers" to represent an indigent civil litigant. Can Respondent even suggest the ludicrous notion that Petitioner was on notice of the existence of Respondent's inherent powers after the entry of *Mallard*?

Perhaps Respondent can exercise these heretofore unheard of powers to obtain other things from Petitioner?

To argue that attorneys possess no reasonable expectation of compensation for Section 1915 (d) cases and therefore no taking occurs is impermissible judicial boot- strapping now that *Mallard* is the law. Petitioner completed a lengthy legal curriculum and no mention was ever made of any inherent powers of Respondent and Petitioner has no reason to be on notice Respondent would exercise said authority. (Probably because said powers are non-existent as previously explained).

Respondent's orders of December 1, 1988 and August 15, 1983 overtly appropriate Petitioner's services and covertly convert Petitioner's own funds to a public purpose without any guarantee of reimbursement. Said taking of Petitioner's private property for a public purpose without just compensation is in direct violation of the the Fifth Amendment of the United States Constitution.

In light of the above authorities and the facts herein Petitioner respectfully requests this Honorable Court enter its Writ of Certiorari ordering the Respondent, the United States District Court for the Eastern District of Missouri to cease its unconstitutional appropriation of Respondent's services and funds, to render Respondent's orders of December 1, 1988 and August 15, 1989 null and void pending a full briefing of the issues presented in this memorandum of law and to thereafter declare said Writ to be absolute.

CONCLUSION

Petitioner submits to this Honorable Court that Respondent clearly exceeded its jurisdiction by entering the order of December 1, 1988 and thereby attempting to compel Petitioner to represent Mellott against Petitioner's will. This Court has clearly and unequivocally stated that Respondent is not authorized by 28 U.S.C. Section 1915 (d) to make such compulsory appointments of counsel. Petitioner was therefore unquestionably entitled to have his motion to withdraw sustained.

Respondent however unreasonably refused to sustain said motion and thereafter sought to use its "inherent powers" to compel Petitioner to do its bidding. As an Article III inferior federal court Respondent possesses only such authority as is bestowed upon it. Congress has bestowed no such power on Respondent and in fact has, by this Court's determination, made a conscious decision to not so empower Respondent. By definition Respondent possesses no powers which are inherent in it.

Additionally the Fifth Amendment of the United States Constitution guarantees that Petitioner's private property will not be taken for a public use without just compensation. The orders of Respondent effectively violate this important constitutional guarantee by appropriating Petitioner's services and funds against his will.

Because of these blatant actions by Respondent in direct contravention of statutory and constitutional provisions, as well as Congress clear intentions, Respondent's orders of December 1, 1988 and August 15, 1989 should not be allowed to stand. Petitioner respectfully requests this Honorable Court grant him relief from Respondent's wrongful coercive actions by entering its preliminary Writ of Certiorari, ordering Respondent, the United States District Court for the Eastern District of Missouri, to sustain

Petitioner's Motion to Withdraw and to render null and void Respondent's orders of December 1, 1988 and August 15, 1989.

Respectfully submitted,

W. Morris Taylor
William W. Hollander
120 S. Central, Suite 538
Clayton, MO 63105
(314) 725-7000

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2419

William W. Hollander
Petitioner

ORDER

Before Bowman, Circuit Judge, Henley, Senior Circuit Judge, and Fagg, Circuit Judge.

Petitioner complains of his appointment by the District Court to represent an indigent plaintiff in a civil rights action brought pursuant to 42 U.S.C. § 1983. Petitioner relies upon the decision of the United States Supreme Court in *Mallard v. United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814 (1989). In that case, the Supreme Court held that 28 U.S.C. § 1915 (d) merely authorizes courts to request attorneys to represent indigent litigants in civil cases and does not permit courts to require such representation.

We note, however, that the District Court's order of August 15, 1989, which is that court's most recent order in this matter, requires petitioner to represent the indigent plaintiff pursuant to the court's inherent powers. We further note that in *Mallard* the Supreme Court expressly limited its holding to an interpretation of § 1915 (d). The Court declined to:

> express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve. Although respondent and its *amici* urge us to affirm the Court of Appeals' judgment on the ground that the

> federal courts do have such authority, the District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for a writ of mandamus. We therefore leave that issue for another day.

109 S. Ct. at 1923.

Because we believe that the District Court has acted properly within its inherent powers, the petition for writ of mandamus is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

No. N 88-0136 C

ORDER

IT IS HEREBY ORDERED that plaintiff's motion for appointment of counsel be and it is granted.

IT IS FURTHER ORDERED that William W. Hollander, 120 S. Central, Suite 538, St. Louis, MO 63105, be and is appointed, pursuant to 28 U.S.C. § 1915 (d), to represent plaintiff in this action. The Clerk shall provide appointed counsel with a copy of the complete Court file.

Dated this 1st day of December, 1988

George Gunn

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

No. N 88-0136 C

ORDER

IT IS HEREBY ORDERED that William W. Hollander's motion to withdraw as attorney for plaintiff herein be and it is denied. The Court shall require Mr. Hollander to represent plaintiff, an indigent who is unable to retain counsel, pursuant to this Court's inherent powers.

Dated this 15th day of August, 1989.

George Gunn

UNITED STATES DISTRICT JUDGE

APPENDIX D

FEDERAL STATUTE INVOLVED

Title 28 U.S.C.

§ 1915. Proceedings in forma pauperis

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

***

United States Constitution

Article III, Section 2

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party; –to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

***

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
MAR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HOLLANDER,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 89-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HOLLANDER,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent United States District Court for the Eastern District of Missouri respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision in this case of the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Pursuant to S.Ct. R. 21.1(e)(iv) (superseded effective January 1, 1990, by S.Ct. R. 14.1(e)(iv)), petitioner has erroneously invoked this Court's jurisdiction under the All Writs Statute, 28

U.S.C. §1651(a), in seeking a common-law writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Supreme Court Rule 20.1 provides as follows:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Petitioner has presented no exceptional circumstances warranting the exercise of this Court's discretionary powers under the All Writs Statute. Petitioner seeks nothing more than the Court's review of an adverse appellate court decision. Petitioner has, therefore, failed to make the requisite showing set forth in S.Ct. R. 20.1 to justify the granting of a common-law writ of certiorari authorized by 28 U.S.C. §1651(a). If this Court has jurisdiction, the basis for that jurisdiction does not lie under 28 U.S.C. §1651(a).

Petitioner is seeking review of an order filed on September 12, 1989 by a panel of the United States Court of Appeals for the Eighth Circuit denying petitioner a writ of mandamus. Petitioner did not move for a rehearing of the Eighth Circuit's decision, but instead filed his petition for common-law certiorari in this Court on October 27, 1989. Petitioner can obviously obtain adequate relief in this Court in a form other than an extraordinary writ under the All Writs Statute. *See, e.g.*, 28 U.S.C. §1254(1).

Accordingly, because petitioner has failed to demonstrate the existence of any facts or circumstances in support of this Court's jurisdiction under 28 U.S.C. §1651(a), respondent

respectfully requests that the Court deny the petition for writ of common-law certiorari.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED IN THE CASE

U.S. Const. fifth amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. §1651(a)

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §1915(d)

> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the

case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

S.Ct. R. 14.1(e)(iv)
S.Ct. R. 21.1(e)(iv)(superseded)

.1 The petition for a writ of certiorari shall contain, in the order here indicated:

. . . .

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

. . . .

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

S.Ct. R. 20.1

.1 The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

On September 19, 1988, Eldon Mellott, an inmate at the Missouri Training Center for Men in Moberly, Missouri, filed in the United States District Court for the Eastern District of Missouri a pro se civil rights complaint under 42 U.S.C. §1983 styled *Eldon Mellott v. Dr. King, et al.*, No. N88-0136-C. Mellott simultaneously filed an application to proceed in forma pauperis, which was granted.

On October 28, 1988, Mellott filed a motion for appointment of counsel. On December 1, 1988, the Honorable George F. Gunn, Jr., United States District Judge, entered an order pursuant to 28 U.S.C. §1915(d) appointing petitioner, William W. Hollander, to represent Mellott in his civil rights action. On December 15, 1988, petitioner accepted the appointment and voluntarily entered his appearance as follows:

> COMES NOW William W. Hollander and enters his appearance on behalf of Plaintiff, Eldon Mellott.
>
> W. MORRIS TAYLOR, P.C.
>
> By: /s/ William W. Hollander

Petitioner is licensed to practice law in the State of Missouri, and since November 24, 1988, has been a member of the Bar of the United States District Court for the Eastern District of Missouri.

Relying on this Court's May 1, 1989, decision in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. ____, 109 S.Ct. 1814, 104 L.Ed. 2d 318 (1989), petitioner filed a motion to withdraw. Petitioner argued that he lacked the time and necessary resources to devote to the prosecution of Mellott's lawsuit, did not desire to represent him, would never have voluntarily entered his appearance on Mellott's behalf, and would suffer undue hardship if compelled to continue representing Mellott. Thus, more than six months after petitioner's appointment on December 1, 1988, and his voluntary entry of appearance on December 15, 1988, petitioner raised for the first time his numerous objections to his appointment by the district court to represent Mellott.

On August 15, 1989, the district court denied petitioner's motion to withdraw and ruled that "[t]he Court shall require Mr. Hollander to represent plaintiff, an indigent who is unable to retain counsel, pursuant to this Court's inherent powers."

Petitioner then filed a petition for writ of mandamus in the United States Court of Appeals for the Eighth Circuit on September 1, 1989.

A three-judge panel of the Eighth Circuit Court of Appeals in an order dated September 12, 1989, denied the petition for writ of mandamus, ruling that the district court had acted properly within its inherent powers. Petitioner did not file a motion for rehearing or rehearing *en banc*. The mandate issued on October 17, 1989.

On October 27, 1989, petitioner filed his petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF RESPONDENT'S AUTHORITY TO APPOINT PETITIONER PURSUANT TO 28 U.S.C. §1915(d) IS MOOT.

The issue of respondent's authority to appoint petitioner pursuant to 28 U.S.C. §1915(d) is moot. On December 1, 1988, respondent initially appointed petitioner to represent an indigent inmate in his 42 U.S.C. §1983 action against a prison doctor, dentist and other prison officials. *See* Pet. for Cert., App. B at A-3. Without objection, petitioner accepted the appointment and voluntarily entered his appearance for the plaintiff. Six months later, this Court ruled that 28 U.S.C. §1915(d) did not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. *Mallard v. United States District Court for the Southern District of Iowa,* 490 U.S. ____, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989).

Relying on *Mallard,* petitioner moved to withdraw. Respondent denied the motion and entered an order on August 15, 1989, requiring petitioner to represent the plaintiff "pursuant to this Court's inherent powers." Pet. for Cert., App. C at A-4. Petitioner then unsuccessfully sought a writ of mandamus from the Eighth Circuit Court of Appeals.

Because respondent's August 15, 1989 order reappointing petitioner to represent the inmate under the inherent power of the district court supplants respondent's earlier order made pursuant to 28 U.S.C. §1915(d), any question concerning the validity of respondent's December 1, 1988 order is now moot.

IIA. THIS COURT HAS LONG RECOGNIZED CERTAIN POWERS INHERENT IN THE FEDERAL COURTS NOT DERIVED FROM STATUTE IN AID OF THE JURISDICTION OF THE COURTS.

Contrary to petitioner's assertion that federal courts possess only such powers as Congress has conferred upon them by statute, this Court as early as 1812 stated:

> Certain implied powers must necessarily result to our courts of justice from the nature of their institution. . . . To fine for contempt, imprison for contumacy, inforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far as *our courts no doubt possess powers not immediately derived from statute;* . . . .

United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) (emphasis added). Subsequent decisions of this Court have repeatedly recognized a variety of powers inherent in the federal courts reasonably necessary for the proper administration of justice in the exercise of their jurisdiction. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (federal courts have inherent powers to assess attorneys' fees and expenses against counsel as sanction); *Link v. Wabash Railroad Co.,* 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (authority of court to dismiss sua sponte for lack of prosecution is an inherent power governed by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases); *Levine v. United States,* 362 U.S. 610, 615, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) ("the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts"); *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.,* 266 U.S. 42, 65-66, 45 S.Ct. 18, 69 L.Ed. 162 (1924) (power to punish for contempt is inherent and essential to the administration of justice); *In re Peterson,* 253 U.S. 300, 312-13, 40 S.Ct. 543, 64 L.Ed. 919 (1920) (courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties" by appointing special masters, auditors, examiners, and commissioners).

IIB. THE EIGHTH CIRCUIT'S RULING THAT RESPONDENT PROPERLY APPOINTED PETITIONER PURSUANT TO RESPONDENT'S INHERENT POWER IS CONSISTENT WITH UNANIMOUS FEDERAL CASELAW HOLDING THAT THE FEDERAL COURTS HAVE INHERENT POWER TO APPOINT COUNSEL TO REPRESENT INDIGENT LITIGANTS.

In *Powell v. State of Alabama,* 287 U.S. 45, 73, 53 S.Ct. 55, 77 L.Ed. 158 (1932), this Court ruled that the district court's power to appoint counsel for the indigent defendants in that case, "*even in the absence of a statute,* cannot be questioned." (Emphasis added). The Court emphatically declared, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id. See Theard v. United States,* 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (a lawyer is an officer of the court which granted admission, and like the court itself, is an instrument or agency to advance the ends of justice).

All existing federal appellate court decisions hold that district courts have the inherent power to appoint counsel to represent indigent litigants. *See United States v. Accetturo,* 842 F.2d 1408, 1413 (3d Cir. 1988); *United States v. Bowe,* 698 F.2d 560, 566 (2d Cir. 1983) (court has inherent authority to do those things necessary for the administration of justice in the exercise of its jurisdiction, including the power to appoint counsel to represent indigents); *White v. United States Pipe & Foundry Co.,* 646 F.2d 203, 205 n.3 (5th Cir. Unit B 1981); *Peterson v. Nadler,* 452 F.2d 754, 758 (8th Cir. 1971); *Dolan v. United States,* 351 F.2d 671, 672 (5th Cir. 1965); *United States v. Dillon,* 346 F.2d 633, 635-36 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966). As the Third Circuit recently explained in finding the existence of inherent power to appoint:

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's

> responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have, by virtue of their license, a monopoly on the provision of such services. Attorneys who have the privilege of practicing before the court have a correlative obligation to be available to serve the court.

United States v. Accetturo, 842 F.2d at 1413. *See Theard v. United States,* 354 U.S. at 281 ("Membership in the bar is a privilege burdened with conditions.") (quoting *In re Rouss,* 221 N.Y. 81, 84, 116 N.E. 782 (1917) (Cardozo, C.J.)); *United States v. Dillon,* 346 F.2d at 635 ("representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court").

As demonstrated above, the federal authorities have unanimously and long held that federal courts have inherent powers not derived from statute in aid of the courts' jurisdiction, and that one of those inherent powers is the power to appoint counsel to represent indigents. Petitioner has failed to show any reason why this Court should disturb these holdings by exercising its discretion to undertake the review of this case.

IIIA. THE EIGHTH CIRCUIT'S RULING THAT COMPELLED SERVICE OF APPOINTED COUNSEL IS NOT AN UNCONSTITUTIONAL "TAKING" IS CONSISTENT WITH RULINGS OF THIS COURT AND THE OTHER FEDERAL CIRCUIT COURTS.

This Court in *Hurtado v. United States,* 410 U.S. 578, 588, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973), reaffirmed the established principle that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Hurtado* involved a material witness's claims of financial losses suffered during pretrial detention because he was compensated at the statutory rate of only one dollar a day. This Court noted that because there was a public obligation to

provide evidence, no fifth amendment taking occurred, no matter how financially burdensome it was.

In support of its decision, the *Hurtado* Court cited with approval *United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966), as one of several examples of compulsory public service. *Hurtado v. United States,* 410 U.S. at 589. *Dillon* involved a claim for compensation of an attorney "conscripted" to represent a prisoner in a proceeding under 28 U.S.C. §2255. The attorney argued that failure to compensate him would contravene the just compensation clause. The Ninth Circuit, relying on *Powell v. State of Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), rejected the attorney's just compensation claim because there was no taking.

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."

United States v. Dillon, 346 F.2d at 635.

Without exception, other federal courts of appeals have uniformly rejected the arguments of appointed, uncompensated counsel that their compelled service is an unconstitutional taking without just compensation. *See Family Division Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d 695, 705-06, 713 (D.C.Cir. 1984); *White v. United States Pipe & Foundry Co.,* 646 F.2d at 205 n.3.; *Tyler v. Lark,* 472 F.2d 1077, 1078-79 (8th Cir.), *cert. denied sub nom. Beilenson v. Treasurer of U.S.,* 414 U.S. 864, 94 S.Ct. 41, 38 L.Ed.2d 84 (1973). *See also State ex rel. Scott v. Roper,* 688 S.W.2d 757,

773 (Mo. 1985) (banc) ("If a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not quality.").

The courts have determined that an *unreasonable* amount of required uncompensated service might violate the fifth amendment. *See Family Division of Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d at 705. But there is nothing in the record in this case on which a fair and fully informed decision can be made by this Court regarding the reasonableness of respondent's appointment of petitioner. The record is devoid of any evidence reflecting the degree of financial hardship, if any, the assigned representation would impose.

The Court should not exercise its discretion to review this constitutional question on the basis of such a skimpy and undeveloped record, especially in light of the unanimous federal authority holding that compelled, uncompensated service of attorneys does not constitute a taking under the fifth amendment.

IIIB. THE RECORD IS DEVOID OF ANY EVIDENCE THAT PETITIONER HAS BORNE ANY COSTS OR EXPENSES AND, THEREFORE, PETITIONER'S FIFTH AMENDMENT CLAIM OF A TAKING WITHOUT JUST COMPENSATION IS PREMATURE AND NOT RIPE FOR DECISION.

Petitioner argues that respondent's order requiring him to represent an indigent inmate is an unconstitutional taking because petitioner will have to pay costs and expenses out of his own pocket. Other than petitioner's naked, unsupported assertions, the record is devoid of any evidence that petitioner has in fact expended any of his own funds in the prosecution of this case. For this reason, any review of petitioner's claim that he has suffered a taking without just compensation because he has had to pay costs and expenses without reimbursement is premature and not ripe for decision.

The Eight Circuit has held that the payment of expenses by appointed counsel without reimbursement is an unconstitutional taking. *Williamson v. Vardeman,* 674 F.2d 1211, 1214-15 (8th Cir. 1982). For this reason, the Eighth Circuit has directed the chief judges of the district courts in the Eighth Circuit to provide for the reimbursement of appointed counsel for their expenses made in good faith. *Nelson v. Redfield Lithograph Printing,* 728 F.2d 1003, 1005 (8th Cir. 1984). Until petitioner has expended his own funds, he cannot complain of a taking. Moreover, the record does not reflect that petitioner has ever requested reimbursement for expenses, or that respondent has ever denied any such request for reimbursement. Petitioner did move that respondent *advance* his expenses, which respondent denied. Respondent's order denying this motion was entered *after* the Eighth Circuit's ruling on petitioner's request for a writ of mandamus. The Eighth Circuit has, therefore, never had an opportunity to consider any of the issues raised by respondent's denial of petitioner's request for an advance of his expenses.

For the foregoing reasons, any question of petitioner's payment of expenses without reimbursement is premature and not ripe for decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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